



STATE OF WISCONSIN

In the Matter of

██████████
 ██████████
 ██████████ ██████████

DECISION

CFCP/137672

The proposed decision of the Administrative Law Judge dated August 6, 2012, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed December 28, 2011, under Wis. Admin. Code §DHS 10.55, to review a decision by the Community Care Inc. (CCI) in regard to Medical Assistance (MA), a telephonic hearing was held on March 8, 2012. A decision in favor of the petitioner was issued on May 7, 2012 (DHA Final Decision No. FCP/137672). On June 1, 2012, the petitioner's attorney filed a motion for legal fees incurred during the representation of FCP/137672 pursuant to Wis. Stat. §227.485 and Wis. Adm. Code §HA 3.11. The Department of Health Services' (DHS) attorney submitted his response to that motion on June 20, 2012. On June 29, 2012 the petitioner's attorney submitted a final response to the DHS's objections.

The issue for determination is whether the petitioner is entitled to attorney costs.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

██████████ ██████████
 ████████████████████
 ████████████████████

Petitioner's Representative:

Attorney ██████████ J. ██████████
 ████████████████████
 ████████████████████

Respondent:

Department of Health Services
 1 West Wilson Street, Room 651
 Madison, Wisconsin 53703
 By: Attorney Kevin Bailey

ADMINISTRATIVE LAW JUDGE:
 Kelly Cochran
 Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Ozaukee County and has earned less than \$150,000 in each of the last three years.
2. Petitioner was an individual who was the prevailing party in an administrative hearing (Case No. FCP/137672) held on March 8, 2012. Decision No. FCP/137672 was thereafter issued on May 7, 2012.
3. On June 1, 2012 the petitioner's attorney, [REDACTED] [REDACTED] of [REDACTED], [REDACTED] & [REDACTED], S.C., submitted a timely motion for costs that were incurred in connection with Case No. FCP/137672 to the Division of Hearings and Appeals (DHA). This motion was submitted with a detailed, itemized statement of attorney fees and costs, in the amount of \$6406.40, which indicated the actual time expended and hourly fee pursuant to Wis. Stats. §227.485(5).
4. The issue for determination at the March 8, 2012 hearing was (1) whether CCI, as the managed care organization (MCO) for petitioner's Family Care Plan (FCP), met its burden to show that it correctly sought to discontinue petitioner's alternative therapy services for kinesiotherapy.
5. Decision No. FCP/137672, issued on May 7, 2012, determined that the MCO did not meet its burden to show that it was correctly discontinuing the kinesiotherapy.

DISCUSSION

Section 227.485(3), Wis. Stats., provides in pertinent part:

In any contested case in which an individual, a small nonprofit corporation or a small business is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

“Substantially justified” means having a reasonable basis in law and fact. Wis. Stats. §227.485(2)(f). The Wisconsin Supreme Court, in considering the issue of “substantial justification” in Sheely v. Wisconsin Department of Health and Social Services, 442 N.W. 2d 1, 150 Wis. 2d 320 (1988), recited the following language from Phil Schmidt and Son v. NLRB, 810 F. 2d 638, 642 (7th Cir. 1987):

To satisfy its burden the government must demonstrate 1) a reasonable basis in truth for the facts alleged; 2) a reasonable basis in fact for the theory propounded; and 3) a reasonable connection between the facts alleged and the legal theory advanced.

Sheely also cites the federal Equal Access to Justice Act decision in Pierce v. Underwood, 108 S.Ct. 2541 (1988). In that case at 2550, the United States Supreme Court discussed the concept of "substantial justification" as follows:

We are of the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not

"justified to a high degree," but rather "justified in substance or in the main" - that is, justified to a degree that could satisfy a reasonable person. That is no different from the "reasonable basis in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue... [cites omitted].

The Wisconsin courts have further stated that:

In determining whether the governmental action had a reasonable basis in fact and law, DHSS urges us to adopt an "arguable merit" test. DHSS reasons that this test lies somewhere between frivolous actions at one end of the spectrum and the substantial evidence test at the other. We agree.

* * *

A position with arguable merit is one which lends itself to legitimate legal debate and difference of opinion viewed from the standpoint of reasonable advocacy.

Behnke v. DHSS, 146 Wis.2d 178 (1988)

Thus, the question is not whether CCI was actually correct but whether a reasonable person could think that the action by the agency was properly taken and correct, i.e., whether there was arguable merit to the decision.

In the instant case, the petitioner's attorney submitted a timely motion for costs that were incurred in connection with Case No. FCP/137672, as the prevailing party. The motion argued that the hearing examiner should award the petitioner the costs incurred in connection with the contested case, as the agency was not substantially justified in taking its position. The motion argued that the agency was not substantially justified because the decision to deny petitioner's services in the FCP was "not supported by [the agency's] own factual records, and was not supported by the law or policies related to the Family Care Program."

Although CCI may not have met its legal burden at hearing on the challenge to its decision to terminate kinesiotherapy, I find that its decision was based on legitimate professional opinion. The record shows an openness to approving the therapy, continuing it when useful and then terminating it when, in its reasoned judgment, it was no longer a necessary service given other options. The kinesiotherapist may have disagreed in his testimony that petitioner had reached a point where she should move on to alternatives, but that only demonstrates a legitimate difference of opinion and not a lack of reasonableness on the agency's part.

CONCLUSIONS OF LAW

The agency did have substantial justification for its proposed action to deny the petitioner's kinesiotherapy services.

THEREFORE, it is

ORDERED

That petitioner's Motion for Award of attorney fees and costs is DENIED.

REQUEST FOR A REHEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence

which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named as "PARTIES IN INTEREST" in the proposed decision. Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Wisconsin Statutes § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of a timely rehearing request, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. Appeals must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin, 53703.

The appeal must also be served on the other "PARTIES IN INTEREST" named in the proposed decision. The process for Court appeals is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of
Madison, Wisconsin, this ___3RD___
day of ___JANUARY___, 2013.

\s Kitty Rhoades
Kitty Rhoades, Deputy Secretary
Department of Health Services